Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-687

CHRISTIAN CAMENISCH II, RICHARD L. MASTER, JOHN W. SANSING, ROY S. LERMAN, ROBERT CASE LIOTTA, JONATHAN S. BOWERS, ROGER M. GREGORY, JR., Individually and on behalf of all others similarly situated,

Petitioners,

v.

UNITED STATES OF AMERICA, HONORABLE HAROLD H. GREENE, HONORABLE EDWARD A. BEARD, HONORABLE SYLVIA BACON, HONORABLE JOHN D. FAUNTLEROY, HONORABLE EUGENE N. HAMILTON, Individually and as representative of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners, Christian J. Camenisch II, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 23, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit of June 23, 1976 is not reported and is set forth in Appendix A. The orders of the Court of Appeals of August 18, 1976, denying a petition for a rehearing *en banc,* not reported, are set forth in Appendix B. The order of the Court of Appeals of October 7, 1976, amending the order of August 18, 1976 to include a statement by Chief Judge Bazelon, is not yet reported and is set forth in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 23, 1976. A timely petition for rehearing *en banc* was denied on August 18, 1976, and an order amending the court's order of August 18, 1976 to include a statement by Chief Judge Bazelon, was filed on October 7, 1976. This petition for certiorari was filed within ninety days of the order of August 18, 1976. This Court's jurisdiction is founded under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the administration of the Criminal Justice Act by the defendant judges and the United States has the effect of decreasing the quality of representation afforded to indigent defendants in violation of the Sixth Amendment and the Fifth Amendment to the Constitution.

2. Whether the wholesale reduction of court-appointed attorneys' claims for compensation without notice or a hearing violated the due process clause of the Fifth Amendment, was arbitrary and capricious in violation of the due process clause of the Fifth Amendment,

and was violative of the provisions of the Criminal Justice Act and the contract entered into between the court-appointed attorneys and the United States.

3. Whether the plaintiffs have established jurisdiction over the defendant judges of the Superior Court of the District of Columbia and the United States, and have stated claims upon which relief can be granted from the wholesale reduction of court-appointed lawyers' claims for compensation and for otherwise improperly administering the provisions of the Criminal Justice Act.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V:

"... Nor shall any person ... be deprived of life, liberty or property, without due process of law ..."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

Statutes:

18 U.S.C. §3006A(d):

"(1) Hourly rate.—Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services

rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred including the costs of transcripts authorized by the United States magistrate or the court."

* * * * *

"(4) Filing Claims.—A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid."

28 U.S.C. §1331(a):

"Section 1331. Federal question—Amount in controversy—Costs.

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. §1346(a)(2):

"1346. United States as defendant—

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort."

28 U.S.C. §1361:

"1361. Action to compel an officer of the United States to perform his duty—

"The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

11 D.C. Code §1702:

"§11-1702. Responsibilities of chief judges in the respective courts.

"(a) The Chief Judge of the District of Columbia Court of Appeals, in addition to the authority conferred on him by chapter 7 of this title, shall supervise the internal administration of that court—

"(1) including all administrative matters other than those within the responsibility enumerated in section 11-1701(b), and

"(2) including the implementation in that court of the matters enumerated in section

11-1701(b), consistent with the general policies and directives of the Joint Committee.

"(b) The Chief Judge of the Superior Court, in addition to the authority conferred on him by chapter 9 of this title, shall supervise the internal administration of that court—

"(1) including all administrative matters other than those within the responsibility enumerated in section 11-1701(b), and

"(2) including the implementation in that court of the matters enumerated in section 11-1701(b),

consistent with the general policies and directives of the Joint Committee."

STATEMENT OF THE CASE

This case concerns the administration of the Criminal Justice Act, 18 U.S.C. §3006A (hereinafter The Act), and raises the question of whether the administration of the Act by the defendant judges and the United States abridges the rights of indigent criminal defendants by decreasing the quality of legal representation afforded to them under the Act in violation of both the Sixth Amendment and the mandate of the Act.

Congress by that Act established a policy and program to provide representation for indigents charged with criminal offenses, and to provide compensation to the lawyers who represent them in the Federal courts and in the District of Columbia Superior Court, the particular court that this lawsuit concerns.[1] In addition, the Act

[1]Prior to September 3, 1974, the Federal Criminal Justice Act was the governing statute for the representation of indigents in the

[Footnote continued]

provides for investigative, expert, and other services necessary for an adequate defense. Defendant Greene, Chief Judge of the District of Columbia Superior Court, supervises the program, and the other defendants, Associate Judges, administer it and are representative of the class of judges. Plaintiffs sued on behalf of themselves and about 900 other lawyers similarly situated.

Jurisdiction over the United States is based on the Tucker Act, 28 U.S.C. §1346(a)(2) and 28 U.S.C. §1361.

Jurisdiction over the defendant judges is founded under the Tucker Act, as ancillary to that over the United States, and under 28 U.S.C. §1331(a), and 28 U.S.C. §1361.

The Act provides that lawyers appointed under the Act,

> "... *shall ... be compensated* at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district ..." (Emphasis added.) 18 U.S.C. §3006A(d).

It is the established practice, custom and usage that the rate for attorneys appointed under the ACt is $20 an hour for out-of-court time and $30 an hour for in-court time, and these rates are substantially less than the prevailing rate charged by lawyers in the District of Columbia for similar services to non-indigent clients.

Superior Court of the District of Columbia, whereas after that date, such representation is provided by an exclusively local statute, P.L. 93-412 (D.C. Code, §11-2601 et seq.), which is virtually identical to the Federal Act.

Each of the plaintiffs was appointed to represent a criminal defendant pursuant to the Act, and each submitted a claim for compensation; each claim was drastically reduced, and no notice of the reduction nor opportunity for a hearing on the reduction was given.

The reductions in the eight particular cases alleged in the complaint were as follows:

Plaintiff	*Claimed*	*Allowed*
Camenisch	$220.00	$ 45.00
Master	363.96	150.00
Sansing	282.10	60.00
Lerman	177.50	100.00
Liotta	101.00	65.00
Bowers	175.00	20.00
Gregory	145.00	60.00
Gregory	890.00	590.00

Under court procedures established by defendant Greene, claims for compensation on cases disposed of before trial are processed by a judge in chambers, who has had no connection whatsoever with the actual case and who has had no opportunity to review any aspect of counsel's performance. The judge in chambers assignment is rotated among judges of the Superior Court, and each judge who sits in chambers passes on a large number of claims for fees each month.

Defendant Greene has knowledge of the practices complained of herein, but has failed to establish regulations to change these practices, to provide notice and a hearing, and to establish a uniform administration of compensation under the Act.

Plaintiffs allege that the aforementioned administration of the Criminal Justice Act in the Superior Court of

the District of Columbia has the effect of decreasing the quality of representation afforded to indigent defendants, in violation of the Sixth and Fifth Amendments to the Constitution.

In addition, plaintiffs allege that the wholesale reductions of court-appointed attorneys' claims for compensation without notice or a hearing, violate the due process clause of the Fifth Amendment, is arbitrary and capricious in violation of the due process clause of the Fifth Amendment, and is violative of the provisions of the Act, and the contract entered into between the plaintiffs and the United States pursuant to the Act.

Plaintiffs seek from the defendant United States, the award of the monies reduced from their claims. From defendant judges and the defendant class of judges, plaintiffs seek an injunction prohibiting the reduction of claimed compensation submitted under the aforementioned hourly rates. Alternatively, plaintiffs seek an injunction prohibiting reduction of claims without notice or hearing. Further, plaintiffs seek an injunction requiring defendant Chief Judge Greene of the Superior Court to issue regulations establishing uniform administration of the Act in that court, and prohibiting the reduction of claimed compensation, or in the alternative, the reduction of claimed compensation without notice and a hearing.

The complaint was filed on October 4, 1973, and in response, motions to dismiss on the grounds of lack of jurisdiction and failure to state a claim upon which relief can be granted, were filed on behalf of the United States and on behalf of the defendant judges.

In response, plaintiffs moved to amend their complaint and filed an opposition to the motion to dismiss. The

motion for leave to amend was originally denied, but upon plaintiffs' motion for reconsideration, leave to file an amended complaint was granted. After oral argument, the District Court granted the motion to dismiss, without opinion, on the grounds advanced by the defendants.

Plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit, and by Memorandum Opinion filed June 23, 1976, that court affirmed the judgment of the District Court, with a dissent by Judge McMillan, sitting by designation. (App. A)

Plaintiffs then filed a Petition for Rehearing and Suggestion for Rehearing *en banc,* and said Petition for Rehearing *en banc* was denied on August 18, 1976, with Chief Judge Bazelon and Judge McMillan indicating that they would grant the suggestion for rehearing *en banc.* (App. B)

By Order filed October 7, 1976, an Order amending the prior order denying the petition for rehearing *en banc* was filed, with a statement of Chief Judge Bazelon as to why he would grant the rehearing *en banc.* (App. C)

REASONS FOR GRANTING THE WRIT

This case involves an important question of Federal law and Federal statutory interpretation which has not been, but should be settled by this Court. It involves the administration of the Criminal Justice Act, which provides lawyers to represent indigents in criminal cases in every United States District Court and United States Court of Appeals in the country, as well as in the District of Columbia Superior Court, prior to September 3, 1974.

As stated by Chief Judge Bazelon in his statement as to why he would grant rehearing *en banc,*

> "The administration of criminal justice in the District of Columbia is profoundly implicated in this case, which challenges practices in the Superior Court for the payment of fees to court-appointed counsel. Plaintiffs allege facts which, if substantiated, suggest that indigent defendants are not likely to receive adequate representation because their appointed counsel cannot expect to receive adequate compensation. This case thus carries profound implications not only for the propriety interest of plaintiff attorneys, but also for the right of criminal defendants to effective assistance of counsel . . .
>
> ". . . I write this statement to bring the important issues of this case into public view."

Camenisch et al. v. United States of America et al., Order, __ F.2d __, No. 74-1901, October 7, 1976. (App. C)

Since close to 90% of all defendants in the District of Columbia are indigent, and since the plaintiff class represents approximately 85% of all indigents charged in Superior Court, the case has an enormous impact on the administration of criminal justice in the District of Columbia. "Report on Criminal Defense Services in the District of Columbia by the Joint Committee of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar (unified)." April 1975 (hereinafter The Report), at pages 77; 92-93. But, equally important, this case has impact on the administration of criminal justice in the entire Federal system.

I.

THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT BY THE DEFENDANT JUDGES AND THE UNITED STATES HAS THE EFFECT OF DECREASING THE QUALITY OF REPRESENTATION AFFORDED TO INDIGENT DEFENDANTS IN VIOLATION OF THE SIXTH AMENDMENT AND THE FIFTH AMENDMENT TO THE CONSTITUTION.

It is now clear that a defendant has a right to counsel in all criminal cases where he faces a loss of liberty. *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Argersinger v. Hamlin,* 407 U.S. 25 (1973). However, the mere appointment of counsel alone does not satisfy the Sixth Amendment, and the law requires that the defendant is entitled to competent and effective assistance of counsel. *Powell v. Alabama,* 287 U.S. 45 (1932); *DeCoster v. United States,* 487 F.2d 1197, 1202, 159 U.S. App. D.C. 326 (1973). This case addresses itself to the question of whether the Congressional Act, designed to meet the requirements of the Sixth Amendment, actually meets those requirements, and this lawsuit is a proper vehicle to raise these questions. *Barrows v. Jackson,* 346 U.S. 249 (1952).

The Act is thus a legislative attempt to provide and insure the Sixth Amendment right to effective assistance of counsel to indigent criminal defendants. There is, however, increasingly persuasive evidence that the administration of the Act in the District of Columbia Superior Court, as complained of by the plaintiffs herein, has the effect of decreasing the quality of such representation, in violation of the Sixth Amendment.

As stated in the recent "Report on Criminal Defense Services in the District of Columbia by the Joint Committee of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar (unified),"

"The impact that voucher cutting has on the quality of representation is difficult to calculate with any precision. However, the committee's research indicates that there are at least two major effects. First, voucher cutting tends to discourage counsel from making an all-out effort on behalf of each client. Thinking that his voucher may be cut, counsel will think twice about filing a motion, visiting the client in jail, attending a line-up, tracking down witnesses, investigating every possible lead, and the like. The end result in many instances is that some attorneys will take on a large volume of cases, do little more on them than is absolutely necessary and try to get as many of their clients to plead guilty as they can . . .

"A second effect, which is particularly disturbing, is the defection of able, young attorneys who start out taking C.J.A. cases and then abandon criminal practice in the Superior Court . . .

"Voucher cutting, therefore, tends to encourage ineffective representation and to discourage the infusion of new talent." (The Report, at pages 45, 46)

Furthermore, the Report concluded that:

". . . a system which is heavily weighed against the indigent defendant in terms of the compensation that his attorney will receive raises serious questions of equal protection. The indigent's rights under the Constitution are no less than the rights of the well-to-do. And, yet, if his counsel is not adequately paid, the indigent defendant has little reason to expect that his rights will receive the protection they would get if he could afford to retain counsel." The Report at page 79.

Similarly, Judge McMillan in his dissent stated that the practice complained of,

> "Undermines the purpose of the Act by placing an economic barrier in front of lawyers performing services under the Act.
>
> "It deprives indigent defendants of adequately compensated counsel who are economically able to provide thorough representation." *Camenisch et al. v. United States et al.*, Order filed June 23, 1976, Dissent at page 3. (App. A)

Finally, in a case involving another provision of the Act, Chief Judge Bazelon again commented on the effect that the administration of the Act has on the professed purpose of the Act, to provide indigents with effective representation:

> "The statute must be construed and administered in a way which will encourage competent and dedicated attorneys to become involved in the Federal Criminal Courts for, if case loads and statistics are any guide, our need for such lawyers will continue in future years. There is now evidence that among other factors, insistence on the 'extraordinary circumstances' requirement actually deters competent counsel from accepting appointments in extended or complex criminal cases, lowers quality of the defense services provided to individual defendants, and runs the risk of driving the experienced practitioner from the Courts, while discouraging young attorneys from pursuing a career in criminal litigation. A judge-made standard which reaps such consequences is not faithful to the spirit and purpose of the Criminal Justice Act." *United States v. Hunter, etc.*, 394 F. Supp. 997, 1000, 1001 (D.D.C. 1975).

Thus, it is becoming increasingly clear that the administration of the Act in the Superior Court of the District of Columbia has the effect of decreasing the quality of representation afforded to indigent defendants in violation of the Sixth and Fifth Amendments, and the issues raised in this case affect the administration of criminal justice in the entire Federal system.

II.

THE WHOLESALE REDUCTION OF COURT-APPOINTED ATTORNEYS' CLAIMS FOR COMPENSATION WITHOUT NOTICE OR A HEARING VIOLATED THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, WAS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AND WAS VIOLATIVE OF THE PROVISIONS OF THE CRIMINAL JUSTICE ACT AND THE CONTRACT ENTERED INTO BETWEEN THE COURT-APPOINTED ATTORNEYS AND THE UNITED STATES.

The action of the defendant judges in reducing the claims for compensation without notice or a hearing is violative of the due process clause of the Fifth Amendment as interpreted by this Court in *Perry v. Sinderman*, 408 U.S. 593 (1972). In that case, the plaintiff was a college teacher in an institution that did not have a formal tenure system, although the plaintiff's contract had been renewed annually each year for four years, and it was understood, and in fact expressed in the college catalogue that an informal tenure system was in existence. In *Perry*, this Court held that a hearing was required, together with notice, before the college could refuse to renew the plaintiff's contract and stated that:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that sup-

port his claim of entitlement to that benefit . . ." 408 U.S. at 601.

Plaintiffs submit that the situation here is similar to that in *Perry*, in that here there is a mutual understanding that lawyers who take cases under the Act will be compensated at the hourly rates specified in the Act and in practice set at $20 an hour for time out of court, and $30 per hour in court. Yet, in spite of these understandings, as well as a voucher, or contract, provided to each plaintiff upon his appointment, compensation has been severly reduced. Like the plaintiff in *Perry*, these plaintiffs, at the minimum, were entitled to notice and a hearing before their contractual benefits under the Act were reduced.

In addition, the fact that the vast majority of reductions were ordered by the judge in chambers, who has had no connection whatsoever with the case and has had no opportunity to review any aspect of counsel's performance, creates conduct that is arbitrary and capricious in violation of the due process clause of the Fifth Amendment.

In fact, of the approximately 22,000 appointed cases processed in the District of Columbia Superior Court each year, some 19,000 are disposed of prior to trial, and practically all of these cases are referred to the judge in chambers for payment. As extensive interviews with Superior Court judges indicated,

> "Aside from the sheer volume of forms to be reviewed, the chambers judge is in an inherently weak position to pass on the merit of attorneys' claims. The most commonly-voiced complaint of judges was that they have no personal familiarity with the case and, thus, do not know whether claims for in-court time, much less claims for out-of-court

> time, are accurate and legitimate. Indeed, of the 15 judges who have sat as judge in chambers during the past year and a half, eleven answer 'No' when asked if they could give proper consideration to the merits of each voucher . . ." The Report at pages 35-36.

And, aside from the fact that the judges administering the Act have admitted that their actions are, in effect, arbitrary and capricious, the judges further admitted that due to the budgetary restraints placed on the monies available to pay court-appointed attorneys, the judges have no choice but to reduce the claims for compensation in order to preserve the resources available to pay attorneys pursuant to the Act—a constitutionally unjustiable reason for reducing claims. Brief for District of Columbia Appellees, United States Court of Appeals for the District of Columbia Circuit, No. 74-1904, at page 23.

These candid admissions by the defendant judges indicate that the Act is in fact administered in an arbitrary and capricious manner, in violation of the Fifth Amendment, and that the judges have, as stated by Judge McMillan, "Acted in haste and without information instead of on facts learned from due process procedures". *Camenisch et al. v. United States of America et al.*, Order filed June 23, 1976, dissent at page 8. (App. A)

Finally, the reduction of claims for compensation is clearly in violation of not only the spirit, but the mandate of the Act itself.

Section 3006A(d) requires that court-appointed counsel,

> ". . . shall . . . be compensated . . ." at rates not exceeding the $30 per hour and $20 per hour maximums. The Act does not give judges authority to arbitrarily reduce claims for compensation in such a manner that

there is no relationship whatsoever to any kind of hourly rate, and amounts to no more than wholesale slashing of the total claimed. Such reductions are a breach of contract between the plaintiffs and the United States.

Thus,

> "In this setting, it is clear that plaintiffs had a reasonable expectation of compensation in an amount within striking distance at least of the 'established practice, custom and usage', and that they were entitled to due process protections before that expectation was destroyed. *Perry v. Sinderman,* 408 U.S. 593 (1972).
>
> "Their rights were thus violated when, in wholesale fashion, their low but reasonably anticipated fees were slashed to minor fractions of sums claimed, without notice of the proposed cuts and without hearing or opportunity to be heard, by judges uninformed about the cases, the services, the quality and performance of the lawyers, or the results obtained." *Camenisch et al. v. United States of America, et al.*, Order filed June 23, 1976, dissent at page 6. (App. A)

III.

THE PLAINTIFFS HAVE ESTABLISHED JURISDICTION OVER THE DEFENDANT JUDGES OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA AND THE UNITED STATES, AND HAVE STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED FROM THE WHOLESALE REDUCTION OF COURT-APPOINTED LAWYERS' CLAIMS FOR COMPENSATION AND FOR OTHERWISE IMPROPERLY ADMINISTERING THE PROVISIONS OF THE CRIMINAL JUSTICE ACT.

A. Jurisdiction and Cause of Action against the United States.

Jurisdiction over the United States is based upon the Tucker Act, 28 U.S.C. §1346(a)(2), which provides jurisdiction over

> "any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon an express or implied contract with the United States, or for liquidated damages not sounding in tort."

The plaintiffs meet the "not exceeding $10,000" requirement in that they have not yet lost and may never lose $10,000; each claim is based on express and implied contracts with the United States; each claim arises under a law of the United States, namely the Act; and finally, this action arises under the due process clause of the Fifth Amendment, as well as the Sixth Amendment.

Although the plaintiffs had no express contracts with the United States for previously agreed sums of money, the plaintiffs state a cause of action against the United States for the complicity of the United States in fostering the unlawful conduct of the judges, as agents of the United States under the Act, in reducing the claims for

compensation, by paying the reduced sums indicated by the defendant judges. The United States could have, and should have declined to pay the reduced amount for the reason that such reduced amounts were clearly in violation of the terms of the Act, and the Constitution.

In addition, jurisdiction over the United States is based upon 28 U.S.C. §1361, the Federal Mandamus statute.

B. Jurisdiction and Cause of Action against the Defendant Judges.

Jurisdiction over the defendant judges is founded on three alternative bases.

Firstly, jurisdiction over the judges can be had as ancillary to that over the United States under the Tucker Act, since the judges acted as agents of the United States in administering a federal statute. Secondly, there is jurisdiction over the judges for equitable relief under 28 U.S.C. §1331(a), since the $10,000 minimum amount in controversy requirement is satisfied because, if continued, the extreme fee cuts described in the complaint could well deprive a lawyer who accepted such appointments of more than $10,000. *Horton v. Liberty Mutual Insurance Company,* 367 U.S. 348, 353 (1960): *Mississippi and Missouri Railroad v. Ward,* 67 U.S. 485, 492 (1962); *see United Service Men's Fund v. Eastland,* 488 F.2d 1252, 1260-61 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 491 (1975). Finally, jurisdiction is founded upon 28 U.S.C. §1361, the Federal Mandamus statute.

In addition, the complaint alleges violation of the due process and equal protection guarantees of the Fifth Amendment, the right to effective assistance of counsel of the Sixth Amendment, and therefore "arises under the

Constitution, laws or treaties of the United States", 28 U.S.C. §1331(a).

Equitable jurisdiction is called for in this case because the money damages being sought are inadequate, since the Act was designed to provide a continuing program of representation for indigent defendants, while at the same time providing compensation to attorneys who undertook such representation. To allow the compensation reductions complained of to continue undermines and destroys the purposes of the Act, and to simply reinstate the monetary losses of the plaintiffs would not insure that the complained-of violations cease in the future.

Thus far there has been no effort on the part of these defendants or other judges to cease the practice of slashing fees. Without relief from this Court, the practice will undoubtedly continue and both the lawyers and the indigent defendants will continue to be deprived of their benefits under the Act and rights under the Constitution.

C. This is not an appropriate case for the District Court to apply the doctrine of abstention, nor for it to decline jurisdiction as a matter of judicial discretion.

Defendant judges urged below that this is a case for abstention and cited cases involving the Superior Court of the District of Columbia where the District Court had abstained. *McNeily v. Greene* (C.A. No. 1596-71, December 18, 1972); *Cohan v. Malech* (C.A. No. 2168-71, January 14, 1972). Those cases, however, dealt with "judicial administration and internal affairs of the Superior Court", *McNeily v. Greene,* Order page 3, whereas the instant case deals with the administration of a Federal statute, and the guarantees and requirements of the Constitution.

In *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973), this court reaffirmed that abstention is a doctrine to be used only in narrowly limited special circumstances, and cautioned that courts should not allow abstention to,

> ". . . amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States' ".

Similarly, underlying the doctrine of abstention is the policy of minimizing Federal-State friction and in this case, there is no Federal-State question, and although cooperation between the court systems in the District of Columbia is a worthy objective, adjudication by the District Court does not foster Federal-State friction.

Ultimately, the majority opinion in the Court of Appeals rested its affirmance on the fact that since the District of Columbia Superior Court is in the early stages of administering a new local statute, the court should not dictate by injunction or declaratory judgment precisely how that Act should be administered. The court noted that the decision to issue a declaratory judgment, or to enter an injunction, is a matter of judicial discretion, and stated that,

> ". . . In our view a sound exercise of that discretion by the District Court would mandate denial by it of the requested relief." *Camenisch et al. v. United States of America, et al.*, Order filed June 23, 1976, majority opinion at page 8. (App. A)

This argument is misplaced, and was based upon various assertions and questions foreign to the facts and record before the court, and was further based upon what appears to be an evaluation of the merits of the lawsuit, as opposed to an evaluation of the jurisdictional basis

and the alleged cause of action, the subjects of the motions to dismiss.

Firstly, the local statute and the federal act, as indicated, are virtually identical. In addition, the operation and administration of both statutes have been virtually identical.

Secondly, it was suggested or implied that arbitrary fee cutting is justified by a shortage of money; that lawyers are often asked to render free services; that *ad hoc* reasons may exist for some of the reductions; that taking the time for informed and rational decisions would overburden the trial courts; that as Judge McMillan stated,

> ". . . That somewhere, somehow, there must exist a better world in the lower court or in the administrative area, where plaintiffs can conceivably get their constitutional claims recognized; that a new statute, the District of Columbia Criminal Justice Act of September 3, 1974, has somehow worked a change in this situation (or may do so); and that the court, therefore, should do nothing about the unconstitutional practices complained of." *Camenisch et al. v. United States of America et al.*, Order filed June 23, 1976, dissent at page 6-7. (App. A)

Furthermore, the defendants below asserted that the plaintiffs had not exhausted their remedies by seeking relief in the District of Columbia Court of Appeals and that, for that reason, as well as the others already discussed, jurisdiction in the District Court was inappropriate.

That argument also must fail, and the fact is, as stated by Judge McMillan, that,

"No previous exhaustion of remedies by seeking extraordinary relief in the District of Columbia Court of Appeals should be required. Plaintiffs are not parties to actions pending in Superior Court; there is no recognized avenue of appeal from what happened to them; they are lawyers wronged by an *administrative* ruling under a particular statute–*not* litigants in a Superior Court trial. The District of Columbia Court of Appeals had no statutory jurisdiction over these fee matters; that duty at that time rested on the Superior Court for the District of Columbia under 18 U.S.C. §3006A. When that court acted unconstitutionally in administrative matters, plaintiffs went to a proper court to assert their constitutional rights, and are rightfully here on appeal." *Camenisch et al. v. United States of America et al.*, Order filed June 23, 1976, Dissent at page 5. (App. A)

Thus, the plaintiffs herein have asserted proper jurisdiction, have stated numerous claims upon which relief can be granted, and have raised issues which have profound effect on the administration of justice not only in the District of Columbia, but in every other United States District Court and United States Court of Appeals, where indigent defendants are represented by counsel pursuant to the provisions of the Act.

CONCLUSION

For the reasons stated herein, petitioners pray that this petition be granted and a Writ of Certiorari issue to review the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 74-1904 September Term, 1975
Civil 1868-73

Christian J. Camenisch, II, et al.,
Appellants

v.

United States of America, et al

Appeal from the United States District Court for the District of Columbia.

Before: McGowan and Leventhal, Circuit Judges and McMillan,* United States District Judge for the Western District of North Carolina

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment——————of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/George A. Fisher
George A. Fisher
Clerk

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*Sitting by designation pursuant to 28 U.S.C. §292(d)
Dissenting opinion filed by District Judge McMillan.

MEMORANDUM

Plaintiffs, on behalf of themselves and approximately nine hundred other attorneys similarly situated, filed a complaint in the District Court against the United States and the judges of the Superior Court of the District of Columbia, alleging that reductions in the amounts of their claimed compensation under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A (1970), constitute a breach of contract and violate the Fifth Amendment. All defendants moved to dismiss for lack of jurisdiction and failure to state a claim; and the court, without opinion, ordered dismissal.

The Criminal Justice Act provides that attorneys appointed under the Act to represent indigent criminal defendants shall recover their expenses and

> . . . *shall* . . . *be compensated* at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district . . . . (Emphasis added.)
>
> • • • •
>
> [T]he court shall fix the compensation and reimbursement to be paid to the attorney . . . .

---

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

18 U.S.C. § 3006A (1970). Plaintiffs provided representation under the Act by appointment between February 1, 1971 and October 4, 1973—the date of the complaint. They allege that the established practice, custom, and usage in the Superior Court with respect to Criminal Justice Act claims is to compensate attorneys at the rate of twenty ($20.00) per hour for out of court time and thirty ($30.00) per hour for in-court time, and that these rates are substantially less than the prevailing rates charged by members of the District of Columbia bar for similar services to non-indigent clients. It is further alleged that in cases disposed of before trial compensation claims are processed by the "Judge in Chambers," an assignment rotated among the various judges. Given the rotation system, there is said to be no assurance that the judge passing on the compensation claim will have had prior contact with the case. The complaint also alleges that the plaintiffs' CJA claims have recently been drastically reduced, and that these reductions were accomplished in an arbitrary and capricious manner, without notice, opportunity for hearing, or the statement of reasons for the reduction.

Plaintiffs seek money damages against the United States in the amount of the difference between filed claims based on the maximum rates and the claims actually allowed. With respect to the defendant judges, they seek prospective relief by way of declaratory judgment and injunction. In the case of the claim for damages, plaintiffs asserted jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970), which gives the district courts concurrent jurisdiction with the Court of Claims over

> "Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, *or*

upon an express or implied contract with the United States, or for liquidated damages not sounding in tort." (Emphasis supplied).

It is clear from the complaint that plaintiffs have no legal claim against the United States for sums in excess of the amounts actually authorized by the judges of the Superior Court. The Criminal Justice Act is not self-executing; payment can be made only after a judge has determined the appropriate fee. 18 U.S.C. § 3006A (d)(4) (1970). The role played by the Administrative Office of the United States Courts within this statutory framework is actually quite limited; it is to disburse funds pursuant to an authorized voucher, and it has no authority to make further payments once the approved amount has been paid. *See id.* § 3006A(j). To the extent that the complaint seeks money damages in excess of the amounts actually approved by Superior Court judges and subsequently paid by the Administrative Office, there is no claim against the United States within the meaning of the Tucker Act, and consequently no jurisdiction under 28 U.S.C. § 1346(a)(2).

With respect to the claim for declaratory and injunctive relief, the defendant Superior Court judges, not having answered the complaint by reason of the motion to dismiss, have not in the present state of the record denied that these claims are reduced by judges who are unacquainted with the details of the representation involved, that the reductions are accomplished without providing attorneys with a hearing on the issue, and that no reasons are given for the reductions. Standing alone, these allegations raise procedural due process issues, but we have concluded that it would be inappropriate at this time for a federal court to grant the requested relief.

The complaint speaks as of a time when the federal Criminal Justice Act was applicable to the local District

of Columbia courts, and federal monies were appropriated for payment of vouchers approved by Superior Court judges. Apparently recognizing the numerous difficulties that the local District of Columbia Government experienced in implementing the federal Criminal Justice Act, including most especially the inadequacy of the funds provided to meet the claims filed, Congress has, since the judgment under review was entered, enacted a separate and independent "District of Columbia Criminal Justice Act" for the local courts as part of the District of Columbia Code, with appropriations to be made directly to the District Government. Pub. L. No. 93-412, §§ 2-3, 88 Stat. 1089, *see* D.C. Code §§ 11-2601 to 11-2609.

The responsibility for the development and implementation of a plan to provide representation under the new statute falls to the Joint Committee on Judicial Administration of the local D.C. courts. That Committee consists of (1) the Chief Judge of the District of Columbia Court of Appeals, who serves as Chairman, (2) an associate judge of that court elected annually by the judges thereof, (3) the Chief Judge of the Superior Court and (4) two associate judges of that court elected annually by the judges thereof. D.C. Code § 11-1701(a).

Since the local courts are in the early stages of administering a new statute designed for their use alone, this is hardly the time for a federal court to prescribe by injunction or declaratory judgment precisely how that act should be either interpreted or administered. The decision to issue a declaratory judgment or to enter an injunction is a matter of judicial discretion, *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 19 (1965) (declaratory judgment); *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943) (injunction), and in our view a sound exercise of that discretion by the District Court would mandate denial by it of the requested relief. Under these cir-

cumstances, we leave the judgment appealed from undisturbed.[1]

[1] Although this disposition renders it unnecessary for us to pursue the matter further, it seems unlikely that there is any statutory or constitutional bar to determination of attorney's fees by a judge other than the one trying the case (*i.e.*, by the chief judge, a judge assigned administrative duties, or by rotation). In any event, such determination is one that, albeit of an ancillary nature, would seem to be subject to legal challenge only on direct review.

McMILLAN, *District Judge*, dissenting:

The decision appealed from is a one-sentence order, without opinion, dismissing the complaint. No evidence was taken in the trial court. The only facts before us are those alleged in the complaint.

The decision ought to be based on those facts, giving the pleader at least some of the inferences in his favor.

I fear the majority opinion ignores or discounts the facts, and relies on some comfortable assumptions based on considerations outside the record and contrary to reality.

I dissent.

THE FACTS

Plaintiffs are lawyers who practice in the criminal Superior Courts of the District of Columbia and who between February 1, 1971, and October 4, 1973, represented and may thereafter represent indigent criminal defendants, by appointment of the Superior Court judges of the District of Columbia under the Criminal Justice Act, 18 U.S.C. § 3006A. Congress by that Act established a program and policy to provide representation for indigents charged with criminal offenses, and to provide compensation to the lawyers who represent them. Defendant Greene, Chief Judge of the Superior Court, supervises the program and the other defendants, associate judges, help run it. Plaintiffs sued on behalf of themselves and about nine hundred other lawyers similarly situated.

The Act (18 U.S.C. § 3006A(d)) provides that lawyers appointed under the Act shall recover their expenses and

> ". . . *shall* . . . *be compensated* at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour

for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district . . . ." (Emphasis added.)

* * * *

"[T]he court shall fix the compensation and reimbursement to be paid to the attorney . . . ."

The maximum fee allowable in misdemeanor cases is $400, and the maximum allowable in felony cases is $1,000.

It is established practice, custom and usage that the rate for attorneys appointed under the Act is $20 an hour for out of court time and $30 an hour for in-court time.

These rates are substantially less than the prevailing rate charged by members of the District of Columbia bar for similar services to non-indigent clients.

Each of the plaintiffs was appointed by a Superior Court judge to represent a criminal defendant pursuant to the Act. Each submitted a claim for compensation. Each claim was drastically reduced, and paid in the reduced amount. No notice of nor reason for the reduction was given. No opportunity for a hearing on the reduction was given.

The reductions in the eight particular cases alleged in the complaint were:

Plaintiff	Claimed	Allowed
Camenisch	$220.00	$ 45.00
Master	363.96	150.00
Sansing	282.10	60.00
Lerman	177.50	100.00
Liotta	101.00	65.00
Bowers	175.00	20.00
Gregory	145.00	60.00
Gregory	890.00	590.00

Under procedures established by defendant Greene, fee claims on cases disposed of before trial (by motion, dismissal, *nol pros*, etc.) are processed by a judge in chambers, though not always by the same judge. The chambers fee-fixing assignment is rotated among various judges.

The judges who thus sit in chambers pass on a large number of claims for fees in cases with the majority of which they have had no contact until called upon to review the fee claims under the Act.

As a result, the decisions of those judges are made without adequate knowledge and are necessarily arbitrary.

Defendant Greene has failed to set up regulations to change these practices, to provide notice and hearing, and to establish a uniform administration of compensation under the Act.

The practice complained of continues.

It undermines the purpose of the Act by placing an economic barrier in front of lawyers performing services under the Act.

It deprives indigent defendants of adequately compensated counsel who are economically able to provide thorough representation.

The injury is alleged to be irreparable and the remedy at law inadequate.

Based on the above facts, plaintiffs say that the fee-cutting actions of defendants (a) constitute a breach of contract and violate the Act; (b) are arbitrary and capricious and thus violate the Fifth Amendment; (c) violate the due process clause of the Fifth Amendment by taking property without notice and opportunity for hearing.

They seek money damages from the United States, a declaration of their rights, and equitable relief against the judges to change the way fees are set.

JURISDICTION

The Tucker Act, 28 U.S.C. § 1346(a)(2), provides jurisdiction over

> "Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon an express or implied contract with the United States, or for liquidated damages not sounding in tort."

Plaintiffs meet the "not exceeding $10,000" requirement; they have not yet lost and may never lose $10,000. They have rights to compensation under an "Act of Congress," because 18 U.S.C. § 3006A(d) provides that appointed lawyers "shall . . . be compensated . . . ." However, they had no express contracts with the United States for agreed sums of money; § 3006-(d) is not self-executing; it depends on a judge to determine a dollar amount for the fee; it depends on the Administrative Office to pay the approved amount under § 3006A(j); and when the approved amount is paid, the Administrative Office has no more authority to make any further payment. The Tucker Act is therefore a basis for jurisdiction, but the complaint fails to state a claim against the United States. The claim for money damages against the United States was correctly dismissed.

Against the judges there is jurisdiction for equitable relief under 28 U.S.C. § 1331. The $10,000 minimum amount in controversy requirement is satisfied because, in time, if continued, the extreme fee cuts described in the complaint could well deprive a lawyer who accepted

such appointments of more than $10,000, *Horton v. Liberty Mutual Insurance Company*, 367 U.S. 348, 353 (1960); *Mississippi and Missouri Railroad v. Ward*, 67 U.S. 485, 492 (1862); *see United Service Men's Fund v. Eastland*, 488 F.2d 1252, 1260-61 (D.C. Cir. 1973), *rev'd. on other grounds*, 421 U.S. 491 (1975). The complaint alleges violations of the due process and equal protection guaranties of the Fifth Amendment, and the suit therefore "arises under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331(a).

No previous exhaustion of remedies by seeking extraordinary relief in the District of Columbia Court of Appeals should be required. Plaintiffs are not parties to actions pending in Superior Court; there is no recognized avenue of appeal from what happened to them; they are lawyers wronged by an *administrative* ruling under a particular statute—*not* litigants in a Superior Court trial. The District of Columbia Court of Appeals had no statutory jurisdiction over these fee matters; that duty at that time rested on the Superior Court for the District of Columbia under 18 U.S.C. § 3006A. When that court acted unconstitutionally in administrative matters, plaintiffs went to a proper court to assert their constitutional rights, and are rightfully here on appeal.

THE RIGHT VIOLATED

Plaintiffs, however troublesome their contract claim against the United States, had a property right—a reasonable expectation of compensation.

This expectation rests on two footings.

First, § 3006A says that court-appointed counsel ". . . *shall . . . be compensated . . .*" at rates not exceeding the $30 per hour and $20 per hour maximums. This legislative command to compensate appointed lawyers rebuts

the notion that such appointed lawyers are merely faithful court lackeys, fortunate to get crumbs from a generous court. It expresses a policy of Congress to pay professional advocates for a service which the public requires and criminal defendants need.

Second, the undisputed facts before this court (App. P. 13) are that:

> "It is the established practice, custom and usage that the rate for attorneys appointed under the Act is $20.00 an hour for out-of-court time and $30.00 an hour for in-court time."

In this setting, it is clear that plaintiffs had a reasonable expectation of compensation in an amount within striking distance at least of the "established practice, custom and usage," and that they were entitled to due process protections before that expectation was destroyed. *Perry v. Sinderman*, 408 U.S. 593 (1972).

Their rights were thus violated when, in wholesale fashion, their low but reasonably anticipated fees were slashed to minor fractions of sums claimed, without notice of the proposed cuts and without hearing or opportunity to be heard, by judges uninformed about the cases, the services, the quality and performance of the lawyers, or the results obtained.

THE ILLUSORY DEFENSES

Much of the time in oral argument of the appeal was taken up by assertions and questions foreign to the facts and the issues they raise.

For example, it was suggested or implied that arbitrary fee fixing is justified by a shortage of money to pay fees; that lawyers are often called on to do free work and therefore should not complain of sharp fee cuts or no fees at all; that ad hoc reasons may exist for some

of the reductions; that taking time for informed and rational rather than uninformed and arbitrary fee decisions would over-burden the trial courts; that somewhere, somehow, there must exist a better world in the lower court or in the administrative area, where plaintiffs could conceivably get their constitutional claims recognized; that a new statute, the District of Columbia Criminal Justice Act of September 3, 1974, has somehow worked a change in the situation (or may do so); and that the court, therefore, should do nothing about the unconstitutional practices complained of.

The trouble with those contentions is that (except for the judicial notice which the court is entitled to take of any Act of Congress) they are not before this court; there is not a shred of evidence to support them; they are illusory defenses.

In the vernacular of Mr. Micawber, they simply ask the court to stay its hand because "something will turn up."

Moreover, the only document cited on behalf of these defenses during the argument strongly *supports* the position of the plaintiffs. That document, *not* a part of the record, is the April, 1975, "Report on Criminal Defense Studies in the District of Columbia by the Joint Committee of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar (unified)." On August 6, 1975, that report was presented to the Judicial Conference of the District of Columbia Circuit, which

> "receives the report . . . with thanks but takes no position with respect thereto."

That report (pages 33-55) indicates that fee approvals are still handled in essentially the same way described in the complaint in this case—and with the same adverse effects on the constitutional rights of the lawyers and

on the quality and availability of defense services. The report makes some recommendations for improvement, but there is no word on what has happened to those recommendations. Lawyers' recommendations, not adopted by judges, are hardly a substitute for judicial decision.

CONCLUSION

The case is here because judges acted in haste and without information instead of on facts learned through due process procedures.

This court will not help the cause of law and order if it substitutes hope and assumptions for haste and a lack of information.

This court is neither intended nor equipped to discover and evaluate the facts on which decision of this case on its true merits should be made. That is the job of the trial court.

The evidence should be heard, the facts found, and the issues decided on their merits by a trial judge.

The case should be remanded for consideration on its merits.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 74-1904 — September Term, 1975
Civil Action 1868-73

Christian J. Camenisch, II,
et al

Appellants

v.

United States of America, et al.

Before: McGowan and Leventhal, Circuit Judges; McMillan*, U.S. District Judge for the Western District of North Carolina.

ORDER

On consideration of the petition for rehearing filed by appellants Camenisch, et al., it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam
For the Court:

/s/George A. Fisher
GEORGE A. FISHER
Clerk

U.S. District Judge McMillan would grant appellants' petition for rehearing.

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*Sitting by designation pursuant to Title 28 U.S.C. Section 292(d).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 74-1904 September Term, 1975
Civil Action 1868-73

Christian J. Camenisch, II,
et al

Appellants

v.

United States of America, et al.

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

The suggestion of appellants Camenisch, et al. for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:

/s/George A. Fisher
GEORGE A. FISHER
Clerk

Chief Judge Bazelon would grant appellants' suggestion for rehearing *en banc*.

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1904

CHRISTIAN J. CAMENISCH, II, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL

On Suggestion for Rehearing *En Banc*

Filed October 7, 1976

Before: BAZELON, *Chief Judge*; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

ORDER

The suggestion of appellants Camenisch, et al. for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Chief Judge Bazelon would grant appellants' suggestion for rehearing *en banc.*

ORDER AMENDING ORDER DENYING SUGGESTION FOR REHEARING EN BANC

It appearing that the original order entered herein on August 18, 1976 which denied appellants' suggestion for rehearing *en banc* did not reflect the fact that Chief Judge Bazelon was issuing a statement as to the reasons why he would have granted rehearing *en banc*, it is

ORDERED by the Court *sua sponte* that the order of this Court entered on August 18, 1976, denying appellants' suggestion for rehearing *en banc* is amended to include a statement by Chief Judge Bazelon, which statement is attached to this order. In all other respects the order of August 18, 1976, is unchanged.

STATEMENT OF CHIEF JUDGE BAZELON AS TO WHY HE WOULD GRANT REHEARING EN BANC

The administration of criminal justice in the District of Columbia is profoundly implicated in this case, which challenges practices in the Superior Court for the payment of fees to court-appointed counsel. Plaintiffs allege facts which, if substantiated, suggest that indigent defendants are not likely to receive adequate representation because their appointed counsel cannot expect to receive adequate compensation. This case thus carries profound implications not only for the propriety interests of plaintiff attorneys, but also for the right of criminal defendants to effective assistance of counsel.[1]

Despite its importance, plaintiffs' complaint was dismissed in the district court without opinion. Afterwards,

[1] *See* United States v. DeCoster, 487 F.2d 1197 (D.C.Cir. 1973).

a panel of this court affirmed that dismissal under local Rule 8(f), which allows cases to be disposed of by memorandum opinions that are not published. I would grant rehearing en banc to reconsider the panel's affirmance for the persuasive reasons set forth in Judge McMillan's dissenting memorandum opinion, which is appended along with the panel majority's memorandum.[2] I write this

[2] I note that the panel's ground of affirmance does not forever foreclose plaintiffs' claims in federal court. "Since the local courts are in the early stages of administering a new statute [District of Columbia Criminal Justice Act, 18 U.S.C. § 3006A (West Supp. 1976)] designed for their use alone, *this is hardly the time* for a federal court to prescribe by injunction or declaratory judgment precisely how that act should be either interpreted or administered." Memorandum, *infra* at 8 (emphasis added). I trust that the considerations of comity persuading the court not to exercise its equitable powers at this time will not be found to outweigh the substantial interests of counsel and indigent defendants beyond the period reasonably required for the local courts to bring the administration of the Criminal Justice Act into line with the mandates of due process.

Although the panel states in dicta that "it seems unlikely that there is any statutory or constitutional bar to determination of attorney's fees by a judge other than the one trying the case," Memorandum, *infra* at 9 n.1, this statement does not foreclose plaintiffs' due process claims. Plaintiffs contend that there must be some rational basis for the cutting of their vouchers and that rationality would be promoted by requiring the judge who heard the case also to rule on the attorney's voucher. Because rationality might also be promoted by requiring the judge who heard the case to describe the attorney's performance in writing so that another judge might have some sensible basis for disposing of the voucher, *see* United States v. Thompson, 361 F.Supp. 879, 884 (D.D.C. 1973), I agree with the panel that due process does not require one method over another. I read the panel's statement to say no more than this.

statement to bring the important issues of this case into public view.[3]

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[3] *See* Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility,* 23 U.C.L.A.L.REV. 432, 439 (1976).

[Memorandum Opinion of June 23, 1976, attached to Order, is set forth in Appendix A.]